

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of GUSS ROY BRED A and JAMES
JOHN BRED A, JR., Minors.

ANGELA MARIE RUSSELLA and JAMES
RYAN RUSSELLA,

UNPUBLISHED
January 11, 2005

Petitioners-Appellees,

v

JAMES JOHN BRED A, SR.,

Respondent-Appellant.

No. 251731
Wayne Circuit Court
Family Division
LC Nos. 03-080415-AY;
03-080416-AY

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

I. Overview

Respondent James Breda, Sr. appeals as of right from the September 30, 2003, orders terminating his parental rights to the minor children, Guss Breda (d/o/b 7/01/92) and James Breda, Jr. (d/o/b 1/25/91), under MCL 710.51(6) (stepparent adoption). We reverse and remand for further proceedings.

II. Basic Facts And Procedural History

Petitioner Angela Russella, the minors' mother, and co-petitioner James Russella, the minors' stepfather, filed petitions for stepparent adoption and termination of Breda's parental rights on June 25, 2003.

A hearing was held on August 13, 2003. Because Breda was incarcerated, he participated in the hearing by telephone conference. Although the trial court appointed house counsel to represent the minors, none of the remaining parties were represented by counsel, and the referee, after informing Breda of the nature of the action filed against him, stated on the record that Breda did not have the right to an appointed attorney. Breda indicated his intent to contest the petition. Although Breda claimed he had not received a copy of the petition, and had received the paperwork regarding the telephone conference the day before the hearing, the trial court file contains a copy of a request for waiver of telephone conference that Breda had signed on July 10, 2003.

Breda sent a letter to the trial court dated September 22, 2003, in which he claimed that he had been living with Angela Russella before his incarceration on June 7, 2001, and that he maintained telephone contact with the minors on a weekly basis until he was transferred from the jail to prison on August 3, 2001. He also claimed he wrote weekly letters up until his mother's funeral in November 2001 when Angela Russella asked him to stop writing so frequently because it was upsetting the children. Thereafter, Breda alleged that he wrote monthly until the beginning of May 2002 when, believing the children were not receiving his letters, he sent some small gifts and letters to his brother to pass along to the children. After still receiving no response from the children, he stopped writing and decided to address the situation through the courts when he got out of prison.

An adoption adjudication hearing was held on September 30, 2003. Breda again participated by telephone conference, and only the minors were represented by counsel. Angela Russella testified that she and Breda were divorced on August 30, 1994, at which time Breda was ordered to pay \$104 in weekly child support. Angela Russella married co-petitioner, James Russella, on June 7, 2002. Angela Russella had not received support money or anything of value from Breda from June 25, 2001, to June 24, 2003. Angela Russella testified that Breda was incarcerated during this time and that even when not incarcerated, Breda's support payments were sporadic. She conceded the children had received some holiday money from Breda's family and that they also received a gift sent through the prison for Christmas in 2001. From June 2001 through June 2003, she and James Russella were responsible for the children's food, clothing, and shelter.

Angela Russella testified that she never interfered with Breda's attempts to contact the children, but the children did not want to have contact with him. She put a block on her phone to prevent Breda from calling her home collect at all hours. Angela Russella alleged that Breda's contact generally consisted of attempts to reconcile with her, not attempts to make contact with the children. When Breda was re-incarcerated, Angela Russella asked the children if they wanted to visit him, but they told her they did not want to be around him.

Angela Russella indicated that Breda's visitation rights were restricted in the divorce judgment because of his past domestic violence, and that during the periods Breda was not incarcerated between 1994 and 2001, all visitation occurred in situations that were supervised by Breda's mother or his brothers. Breda's contact with the minors was sporadic, and the children never asked to call, write, or visit Breda. She recalled a time, possibly in 2001, when Breda sent letters to his brother to deliver to the children because the children were refusing his letters.

James Russella testified to the veracity of Angela Russella's testimony, and stated that he was not aware of any instances in which Breda was denied access to the children. He admitted that he declined to accept collect calls by Breda from prison. He also indicated that letters that came from Breda were always addressed to Angela Russella rather than the children. James Russella had a good relationship with the children and they made it clear to him that they did not want to visit their father. They never asked for his assistance in calling or visiting Breda; however, if they had requested, he would have assisted them.

Breda confirmed he and Angela Russella were divorced in 1994, that she was granted custody of the children, and that he was ordered to pay \$104 in weekly child support. He admitted "[his] record wasn't very well at paying." He indicated that he was in prison from 1996

through October 1999, at which time he was released on a tether program. Breda testified that when he was released from prison in November 2000, he moved in with Angela Russella until his most recent incarceration began on June 7, 2001. As in his letter to the court, Breda testified that he talked with the children weekly while in jail, from June through August 3, 2001, and that his contact was cut off when Angela Russella placed a block on her telephone. Breda then began to write weekly until November 2001 when Angela Russella indicated the weekly letters were bothering the children. After that Breda wrote monthly, and sometime close to Mother's Day in 2002 had his brother deliver letters and small leather bracelet gifts to the children. Breda did not attempt any contact with the children after the May 2002 contact through his brother. Breda claimed his brother delivered the letters and gifts and visited a few more times, but was ultimately told not to come back.

Breda testified that he last saw the children in person on November 19, 2001, at his mother's funeral, and last wrote to the children in May 2002. He admitted that one of the children was very upset at the funeral and that although the child told Breda he did not want to see him, Breda did not understand why the child was upset.

Breda's brother, Kenneth Breda, testified that Breda asked him to make contact with the children and that, although he tried to call one time, he did not get through. Believing the phone was blocked, he did not try again. However, he admitted that Angela Russella told him on more than one occasion that she did not have a problem with him visiting with the children. Another of Breda's brothers, John Breda, testified that he took the letters and leather bracelets to the children on Breda's behalf. The children did in fact receive both the letters and gifts. John Breda testified that on one occasion he had gone to Angela Russella's home to talk with her about a bed, and James Russella told him not to come back, attempt to contact the kids or come on his property again. Breda admitted that this incident occurred when he was trying to have contact with Angela Russella, not the children.

Linda Williams, the minors' maternal grandmother, testified that Breda "crushed" his sons by not keeping his promises to them and by choosing to drink rather than be a father. She explained how difficult the paternal grandmother's funeral was for the children because they had been assured Breda would not be present. One of the children became hysterical after seeing Breda present and in chains. Williams testified that she had a close relationship with the children and that they never indicated a desire to write, talk or visit their father. According to Williams, the only thing they ever said about their father was that they hated him.

During Angela Russella's closing statement a fire alarm sounded at the prison. After Breda indicated he was hearing only parts of the sentences, the court stopped the proceedings until Breda indicated it was all right to begin again. The transcript does not indicate the length of the delay.

When the matter reconvened, the trial court asked Angela Russella why it should view the case as one in which the children chose not to have contact with Breda rather than a case in which she prohibited the contact. Angela Russella reiterated her testimony that she permitted visitation but did not force contact when the children did not choose it. Although she began to give additional testimony and Breda indicated he could once again not hear what was being said, the trial court interjected that, because the trial was at the argument stage, the testimony was improper. Arguments were then turned over to Breda.

Breda testified that he lived with Angela Russella between his last two incarcerations and the children liked having him around, so he could not believe they hated him and no longer wanted to be with him. Breda argued that he had done everything for the children, and that while Angela Russella was working and going to school, he would do housework and care for the children when he came home from work. Breda argued it was improper for Angela Russella to allow the children to make the decision whether to have contact with him because, although they might have been upset, they did not hate him, and he would not be gone forever.

The guardian stated that she had met with the children and was speaking on their behalf. She noted there was no question with regard to the lack of consistent support, but acknowledged there was conflicting testimony regarding whether there was ability to contact. She believed it was important that Breda's visitation was restricted by the judgment of divorce, and that while free from incarceration, Breda failed to do anything to lift the restriction. She also noted that Breda's brothers testified they were never denied visitation by Angela Russella. The guardian argued Breda was subject to multiple incarcerations that interfered with his establishing a strong bond with the children, and that there had been no regular and substantial contact with them for the previous two years because of his own behaviors and penal violations. She noted the children did not believe Breda was truthful in his testimony and that they both wanted the adoption to proceed. In her opinion, Breda failed to accept that his behaviors negatively affected his children's lives.

Both children made brief statements indicating they wanted to be adopted by their stepfather and that Breda was not honest when he testified he never laid a hand on them because, when he got drunk, he would get violent and throw them around on the bed and at the walls.

The referee stated he was taking the matter under advisement and would issue a recommendation on October 3, 2003, which could be reviewed by a judge within seven days or appealed to the Court of Appeals within twenty-one days. The referee report on September 30, 2003, indicating that after a contested hearing was held, Breda's parental rights were terminated and the children were placed for adoption.

The referee filed his findings and recommendation on October 3, 2003. The referee found that it was undisputed that Breda had failed for two or more years preceding the filing of the petition to provide support for the children. In addition, the referee concluded that, although it was disputed whether Angela Russella interfered with Breda's contact with the children, the lack of contact was the result of Breda's own actions and inactions, rather than any interference on Angela Russella's part.

Breda filed an objection to the referee's recommendation, a request for appointment of counsel, and a request for a de novo hearing on October 17, 2003. An adoption review hearing was held on November 6, 2003. A review of the transcript reveals that the trial court was confused about the nature of the case before it and that most of the confusion stemmed from the fact that Breda lacked counsel. The trial court indicated the matter could not proceed without counsel present and acknowledged its confusion on the record. After a twenty-minute recess the case was recalled, and the trial court indicated it had clarified the issues. The following exchange occurred between the trial court and Breda:

THE COURT: And, first and foremost, Mr. Breda, the Court has ascertained that the Statute does not provide that you receive court appointed counsel. If you want to retain your own counsel, you would be able to do so.

Mr. Breda, are you in a position to obtain your own counsel at this time?

RESPONDENT FATHER: No, not at this time. No.

THE COURT: Okay. So, in that regard, the Court does not appoint counsel in adoption cases, where there's a termination of parental rights. The court will proceed.

The trial court went on to state that it had reviewed the findings and recommendations of the referee and affirmed the findings with regard to both the lack of Breda's compliance with the support order and the finding that Angela Russella had not interfered with Breda's ability to contact the children.

In response to Breda's objection to the findings, the trial court stated that the fact that Breda had been incarcerated for more than two years, "in and of itself," provided a sufficient basis for the trial court to terminate his rights. Breda raised, through questions, the effect of his alleged substantial effort to contact the children. The trial court acknowledged that it reviewed the testimony regarding Breda's attempts to send letters to the children.

Breda indicated he had many questions to ask those who testified at the hearing and asked the trial court how he could proceed. The trial court told Breda he had a right to appeal, but advised Breda to consult the court rules and statutes because the trial court could not give legal advice. When questioned whether Breda was given an opportunity to question witnesses before the referee, Breda claimed he could not hear much of the proceedings because of a fire alarm. He claimed this was the reason he requested a de novo hearing. Angela Russella responded that the proceedings were held over because they were delayed during the fire alarm, and that Breda was given all the opportunity he wanted to present his case.

The trial court heard some unstructured testimony from Breda's brothers, John and Ken Breda. Although Ken Breda attempted to raise some issues regarding Breda's conduct, the trial court indicated that prior conduct was not relevant. Following this testimony, the trial court concluded that its primary concern was the children, and that the fact that the children had made statements and let their positions be known was paramount. Breda restated his prior position that the children must have been influenced because he had a good relationship with the children when he was living with Angela Russella before his last incarceration, but then they suddenly stopped wanting to communicate. The trial court reiterated that its primary concern was the best interests of the children and that reviewing the findings and recommendation of the referee, it was clear the statutory basis was met because Breda had not seen or supported the children in over two years.

Breda now appeals from the orders terminating his parental rights and placing the children for adoption.

III. Request For Counsel

A. Standard Of Review

We review for an abuse of discretion the trial court's decision whether to appoint counsel for the nonconsenting, noncustodial parent in proceedings brought under MCL 750.51(6).¹

B. MCL 750.51(6)

Breda's parental rights were terminated under MCL 710.51(6), which authorizes the court to terminate a parent's rights to permit a stepparent adoption if two conditions are met:

(a) The other [nonpetitioning] parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.

(b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

Breda, who was incarcerated throughout the proceedings, was incorrectly informed by the referee at the outset of the initial hearing that he was not entitled to appointed counsel. Thereafter, at the November 6, 2003, adoption review hearing, although the trial court's initial reaction was that the hearing should not have proceeded without representation for Breda, the trial court reviewed the statute and, noting that it did not provide for appointed counsel, concluded that Breda was not entitled to an attorney. It is clear from the record that neither the referee nor the trial court was aware appointed counsel was permissible in adoption proceedings that sought the termination of a noncustodial parent's parental rights.

The trial court correctly concluded that nothing in the language of MCL 710.51(6) guarantees a parent the right to an attorney in termination proceedings brought pursuant to that provision. However, in *In re Sanchez*,² the Michigan Supreme Court held that:

[I]n cases which may result in nonconsensual termination of the parental rights of a noncustodial parent under the stepparent adoption provisions of the Michigan Adoption Code, MCL 710.51(6) . . . , the probate court has discretionary authority to appoint counsel to assist an indigent noncustodial parent in contesting the termination of parental rights.³

¹ *In re Sanchez*, 422 Mich 758, 771; 375 NW2d 353 (1985).

² *Sanchez, supra*.

³ *Id.* at 761.

The Court explained that “in exercising such discretion, the trial court is to be guided by the principle of assuring the nonconsenting parent the ability to present a case properly, measured in the particular case by factors such as the relative strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexity.”⁴

In *Sanchez*, a child’s mother and stepfather sought to terminate the father’s rights pursuant to MCL 710.51(6). The father, who had recently been released after two years of imprisonment, requested counsel at the hearing, and the probate court granted his request.⁵ The probate court terminated the father’s rights after finding that he had not visited the child in five years and had not made his support payments.⁶ The father requested counsel for his appeal, but the probate court denied it.⁷ This Court held that *Sanchez* was not entitled to counsel, but the Michigan Supreme Court reversed, holding that “where the trial court has determined that trial counsel is necessary to protect the noncustodial parent’s interests at the termination proceedings, counsel should also be appointed on appeal, absent some change in circumstances, identified by the trial court, which would justify denial of appellate counsel.”⁸ The *Sanchez* Court found it unnecessary to decide whether courts were required to appoint counsel in all stepparent adoption proceedings.⁹ However, the Court did hold that it was an abuse of discretion for the trial court to deny appellate counsel without considering the relevant factors to determine whether legal representation is required.¹⁰

We see no reason to conclude that the trial court’s refusal to appoint counsel at the de novo review hearing without any consideration of the relevant factors is any less an abuse of discretion than a refusal to do so for appellate proceedings. Indeed, in *In re Fernandez*,¹¹ this Court relied on *Sanchez* to conclude that the trial court’s failure to provide counsel sua sponte at the termination hearing constituted an error requiring reversal where the noncustodial father was incarcerated and indigent. Accordingly, we conclude that the trial court’s refusal to appoint counsel for Breda without any analysis of the relevant factors was an abuse of its discretion.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

⁴ *Id.* at 770-771.

⁵ *Id.* at 762.

⁶ *Id.* at 763.

⁷ *Id.* at 764.

⁸ *Id.* at 765.

⁹ *Id.* at 766.

¹⁰ *Id.* at 771.

¹¹ *In re Fernandez*, 155 Mich App 108, 115; 399 NW2d 459 (1986).

